Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

Misc. ..... No. 75-39

RONALD OLIVE
and
DANIEL DUFFY,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit

Petitioners pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on May 9, 1975.

OPINION BELOW

The opinion of the Court of Appeals is an unpublished order which is not to be cited per Circuit Rule 28, but is appended hereto as Exhibit A.

JURISDICTION

The judgment of the Court of Appeals was entered on May 9, 1975 (Exhibit A). Jurisdiction of this Court is envoked under 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

1. Is it error to refuse to expunge the criminal records of police officers who are named as defendants in a criminal indictment subsequent to a jury verdict wherein said defendants are fully and completely exonerated of all criminal liability?

STATUTES INVOLVED

Section 534, Title 28, United States Code provides in pertinent part:

> "(a) The Attorney General shall: (1) acquire, collect, classify and preserve identification, criminal identification, crime and other records; and (2) exchange these records with and for the official use of, authorized officials of the Federal Government, the States, cities, and penal institutions.
>
> (b) The exchange of records authorized by subsection (a) (2) of this action is subject to cancellation if dissemination is made outside the receiving departments or related agencies.
>
> (c) The Attorney General may appoint officials to perform the function authorized by this section."

Section 3301, Title 44, United States Code provides in pertinent part:

> "As used in this chapter, 'records' includes all books, papers, maps, photographs, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriated for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them . . ."

Section 3302, Title 44, United States Code provides in pertinent part:

> "The administrator of General Services shall promulgate regulations, not inconsistent with this chapter, establishing —(2) procedures for the disposal of records authorized for disposal . . ."

Section 3314, Title 44, United States Code, provides in pertinent part:

> "The procedures prescribed by this chapter are exclusive, and records of the United States Government may not be alienated or destroyed except under this chapter."

STATEMENT

A. **Indictment.**

In August, 1973, within the United States District Court for the Southern District of Illinois, Southern Division, these Petitioners, Olive, and Duffy, were charged in a multiple count indictment. Count I charged that these Petitioners conspired to vio-

late civil rights by deprivation under color of law in violation of Title 18, United States Code, Sections 231 and 242. Count II charged that these Petitioners conspired to search without a warrant in violation of Title 18, United States Code, Sections 371 and 2236. Petitioner Olive was charged in Count V with deprivation under color of law in violation of Title 18, United States Code, Section 242. In Count VI, Petitioner Olive was charged with searching without a warrant in violation of Title 18, United States Code, Section 2236. Petitioner Duffy was charged in Count VIII with deprivation under color of law in violation of Title 18, United States Code, Section 242. Finally, Count IX charged Duffy with searching without a warrant in violation of Title 18, United States Code, Section 2236.

B. **Trial and Verdict.**

The trial began before the Honorable Omer Poos in the United States District Court for the Southern District of Illinois at Alton, Illinois, on March 6, 1974. The Government produced numerous witnesses in an effort to prove criminal activity on the part of these Petitioners. At the close of the Government's case, Petitioner Olive's Motions for Judgment of Acquittal with respect to Counts V and VI were granted.

On April 2, 1974, the jury returned a verdict totally exonerating Petitioner Olive of Counts I and II, and Petitioner Duffy of Counts I, II, VIII and IX and judgment was entered on those verdicts. Two weeks subsequent to the verdict, the Civil Rights Division of the United States Department of Justice dismissed the remaining counts against other defendants similarly charged within the instant indictment. As a consequence, these Petitioners as well as other Federal narcotics agents similarly charged, are completely and fully vindicated of all criminal culpability resulting from the incidents described within the indictment herein.

C. **Motion to Expunge.**

Shortly after the verdict of acquittal, these Petitioners filed with the United States District Court for the Southern District of Illinois, Southern Division, a Motion to Expunge any criminal record arising directly or indirectly as a result of the arrest, indictment or trial of the instant case. On August 6, 1974, said Motion was denied and an Appeal was taken therefrom.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Leaves Unanswered the Question of What, if Any, Criteria Is Used by Courts in Determining Whether Expungement of Criminal Records Is Warranted.

The judicial remedy of expungement is inherent and is not dependent on express statutory provision, and it exists to vindicate substantial rights provided by statute as well as by organic law. *United States v. McLeod*, 385 F. 2d 734 (5th Cir. 1967); *Menard v. Saxbe*, 498 F. 2d 1017 (D.C. Cir. 1974). In *Sullivan v. Murphy*, 478 F. 2d 938, 968 (D.C. Cir. 1973), *cert. denied*, 414 U.S. 880, holding that an action for expungement of arrest records is justiciable, the Court stated:

> "The principle is well established that a Court may order the expungement of records, including arrest records, when that remedy is *necessary and appropriate* in order to preserve basic legal rights" (emphasis supplied).

A number of Courts, dealing with a variety of factual situations have concluded that expungement of criminal records was necessary and appropriate and have accordingly expunged those records. In *United States v. McLeod*, 385 F. 2d 734 (5th Cir. 1967), the expungement of arrest records was ordered when the Court determined that arrests were for the sole purpose of harassing civil rights workers. Likewise, in *Bilick v. Dudley*, 356 F. Supp. 945 (S.D. N.Y. 1973) the Court, finding that arrests were without probable cause and had overtones of harassment of a certain group because of political beliefs, ordered that those arrest records be expunged. Again, in *Hughes v. Rizzo*, 282 F. Supp. 881 (E.D. Pa. 1968), expungement was ordered where arrests were for the purpose of harassing "hippies". In *Somey v. Wilson*, 323 F. Supp. 87 (DDC 1971) the District Court, Chief Judge Curran, required the return of any and all

such police forms, indexes, and cross indexes connected with the plaintiff and his case where it was found that the police had twice stopped plaintiff, questioned him as to his activities, and filled out a vagrancy observation form when they had no articulate suspicion that he was engaged in any illegal activity. In the very recent case of *United States v. Hudson* (D.C. Superior Court 16 CRL 2468, decided February 19, 1974), the Court ordered expungement in a situation where the defendant was charged with second degree murder, but the charges were dismissed three days later upon a determination that the deceased died by his own hand.

It is certainly not questioned that the existence of an "arrest" record, whether or not amplified, and whether or not followed by conviction, will subject the arrestee to a host of disabilities in his relation with the criminal justice system, prospective employer whether Government or private credit institutions and agencies controlling professional licenses. In *Menard v. Mitchell*, 430 F. 2d 486, 490 (D.C. Cir. 1970) the Court stated:

> "Even if no direct economic loss is involved, the injury to an individual's reputation may be substantial. Economic losses themselves may be both direct and serious. Opportunities for schooling, employment, or professional licenses may be restricted or nonexistent as a consequence of the mere fact of an arrest, *even if followed by acquittal or complete exoneration of the charges involved*. An arrest record may be used by the police in determining whether subsequently to arrest the individual concerned, or whether to exercise their discretion to bring formal charges against an individual already arrested. Arrest records have been used in deciding whether to allow a defendant to present his story without impeachment by prior convictions and as a basis for denying release prior to trial or an appeal; or they may be considered by a judge in determining the sentence to be given a convicted offender." (emphasis supplied)

There is undoubted "social stigma" involved in an arrest record.[1] Furthermore, the existence of a record may burden a decision whether to testify at trial. *Menard v. Saxbe, supra.* For further discussion and examples of the disabilities flowing from an arrest record, see: *Morrow v. District of Columbia,* 417 F. 2d 728 (D.C. Cir. 1969); *Kowall v. United States,* 53 F.R.D. 211, 225 (W.D. Mich. 1971); *Wilson v. Webster,* 467 F. 2d 1282, 1283-1284 (9th Cir. 1972); *Davidson v. Dill,* 593 P. 2d 157, 159 (Colo. 1972); *Eddy v. Moore,* 487 P. 2d 211, 216 (1971); *Russell v. United States,* 402 F. 2d 185 (D.C. Cir. 1968); *United States v. Cifarelli,* 410 F. 2d 512 (2nd Cir. 1968), *cert. denied,* 393 U.S. 987; *Jones v. United States,* 307 F. 2d 190 (D.C. Cir. 1962), *cert. denied,* 372 U.S. 919. See also: Report of the Committee to Investigate the Effect of Police Arrest Records on Employment Opportunities in the District of Columbia (1967); Miller, "The Closed Door: The Effect of a Criminal Record on Employment with State and Local Public Agencies", (Georgetown University Criminal Law Institute, 1972).

Petitioners in the instant case seek expungement of all records maintained by the United States Department of Justice, the Federal Bureau of Investigation, and each and every other law enforcement agency of the United States relating to criminal proceedings brought against them as a result of their participation as police officers in the well-publicized "Collinsville Drug Raids". Obviously, Petitioners cannot specify with exact certainty those records they desire expunged, since they are not privy to the internal files of the various Federal and State Government agencies. However, in an effort to clarify and narrow their desires, Petitioners seek the expungement of those records commonly referred to as "rap sheets", or "Hoover sheets", or

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[1] That a record of arrest is a "record involving social stigma" see *United States v. Dionisio,* 410 U.S. 1 (1973), quoting from Judge Friendly's opinion in *United States v. Doe* (Schquartz), 456 F. 2d 985 at 898 (2nd Cir. 1972); see also *Thompson v. Washington,* 497 F. 2d 626, 635.

FBI transcripts of arrest records, fingerprint cards, and any and all photographs taken of them in connection with the instant case. Likewise, Petitioners ultimately desire that they might respond in the negative to a question propounded to them regarding whether or not they have ever been charged or arrested.

Petitioners are presently employed as police officers with the St. Louis Metropolitan Police Department in the City of St. Louis, State of Missouri. As a result of the indictment within the instant case and the publicity derived therefrom. Petitioners have been caused to suffer and will continue to suffer undeserved disrepute in their community, among their neighbors, among their professional capacity as police officers in that they may be placed in jeopardy and the effectiveness of their service to both the community and the Police Department will be hampered and curtailed. The instant indictment was nothing more than an allegation which the Government was unable to prove to the satisfaction of a jury. Petitioners now question the propriety of the criminal actions as alleged within that indictment.

Petitioners further contend that their situation is unique in view of their status as Law Enforcement officers. Of primary importance to them is their ability to investigate and obtain convictions of criminal defendants. In that regard, their courtroom testimony is critical and as stated in *Menard v. Saxbe, supra,* the existence of a criminal record may burden a decision of whether to testify at the trial of a criminal defendant, their effectiveness as police officers is rendered meaningless. Furthermore, if they are ineffective as police officers, Petitioners must necessarily seek other employment and will again encounter difficulty based on their criminal records since, as stated in *United States v. Hudson, supra,* Federal employers have access to arrest records and private employers can secure the information indirectly, despite the adoption of prohibitory regulations.

The Seventh Circuit Court of Appeals stated in its unpublished order and opinion within the instant case that "it is urged that these records are at least in part *required* to be maintained by statute 28 U.S.C. § 534, and that in any event expungement is never justified except in *extreme or unusual circumstances* not present here" (emphasis supplied in part). The instant opinion of the Seventh Circuit fails to define or set out the criteria used in determining "extreme or unusual circumstances." Instead, the Court simply states "there is no allegation of unconstitutional arrest or prosecution," *Sullivan v. Murphy*, 478 F. 2d 938 (D.C. Cir. 1973); *United States v. McLeod*, 385 F. 2d 734 (5th Cir. 1967), or of illegitimate motive or purposeful harassment, *Wheeler v. Goodman*, 306 F. Supp. 58 (W.D. N.C. 1969). Inferentially, at least, the Seventh Circuit seems to imply that extreme or unusual circumstances exist only where there is an affirmative showing of unconstitutional arrest and prosecution or illegitimate motive or purposeful harassment. The obvious question raised by this analysis is whether these circumstances are the only criteria which warrant expungement of criminal records.

If the Federal Courts do not expunge records in the normal case then what constitutes the abnormal case or what circumstances are extreme or unusual enough to justify the necessity and appropriateness of expungement? The Federal Courts have not sufficiently resolved this question thus necessitating review by this Court in an effort to define precisely the criteria governing expungement of criminal records.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals.

Respectfully submitted

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APPENDIX

United States Court of Appeals
for the Seventh Circuit

Chicago, Illinois 60604

Argued April 23, 1975

May 9, 1975

Before

Hon. Luther M. Swygert, Circuit Judge
Hon. Philip W. Tone, Circuit Judge
Hon. Robert A. Grant, Senior District Judge*

United States of America,
Defendant-Appellee,

No. 74-1923 vs.

Ronald J. Olive, Donald W. Spicer, and Daniel J. Duffy,
Plaintiffs-Appellants.

Appeal from the United States District Court for the Southern District of Illinois, Southern Division.
No. 73-CR-80-S

Omer Poos, Judge

AMENDED ORDER

Appellants appeal from denial of their motion for expungement of all records maintained by "the United States Department of Justice, the Federal Bureau of Investigation, and each and

* Honorable Robert A. Grant of the Northern District of Indiana is sitting by designation.

every law enforcement agency of the United States" relating to criminal proceedings brought against appellants as a result of their participation as police officers in the well publicized "Collinsville Drug Raids." During the course of these criminal proceedings each of the appellants was fully exonerated. They contend that the continued existence of the records in dispute will subject them to undeserved disrepute and that their careers as police officers will also be jeopardized. They offer no other ground for expungement and cite no cases which would require or support expungement under these rather general allegations. They rely instead on the general power of this court to "correct injustices."

The Government replies that since there are no arrest records involved here, the motion must necessarily refer to and include judicial documents, investigative reports, intra-office memoranda, and FBI identification files. It is urged that these records are at least in part *required* to be maintained by statute, 28 U.S.C. § 534, and that in any event expungement is never justified except in extreme or unusual circumstances not present here. We must agree. Appellants have at most alleged that they were acquitted of the charges against them and that their chosen careers are in the field of law enforcement. There is no allegation of unconstitutional arrest or prosecution. *Sullivan v. Murphy*, 478 F.2d 938 (D.C. Cir. 1973); *United States v. McLeod*, 385 F.2d 734 (5th Cir. 1967), or of illegitimate motive or purposeful harassment, *Wheeler v. Goodman*, 306 F.Supp. 58 (W.D. N.C. 1969). We do not believe the circumstances in this case are so extreme or unusual as to justify the district court or this court in interfering with the legitimate interests of Government law enforcement agencies in maintaining records of their own activities.

Affirmed

Supreme Court, U. S.
FILED
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No. 75-39

In the Supreme Court of the United States

OCTOBER TERM, 1975

RONALD OLIVE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the courts below erred in refusing to order expungement of all federal records relating to their indictment and trial after they were acquitted of the criminal charges brought against them.

In August 1973, petitioners, who are St. Louis police officers, were indicted by a federal grand jury for alleged violations of 18 U.S.C. 242, deprivation of civil rights under color of law, and 18 U.S.C. 2236, conducting an illegal search. At the close of the government's case, the district court granted petitioner Olive's motion for judgment of acquittal as to several counts, and, subsequently, the jury returned a verdict acquitting both petitioners of the remaining charges. Petitioners then filed a motion for expungement of all federal records

"arising directly or indirectly as a result of the[ir] arrest,[1] indictment or trial * * * " (Pet. 5). The motion was denied by the district court and the denial was affirmed by the court of appeals (Pet. App. A-1 to A-2).

1. In holding that petitioners were not entitled to expungement in the absence of proof that their indictment or prosecution had been legally or constitutionally improper, the court of appeals correctly implemented well-established legal principles. As the court of appeals held, the Department of Justice is required by statute to maintain criminal identification records, 28 U.S.C. 534, and the mere fact of acquittal does not justify expungement (Pet. App. A-2). See *United States* v. *Linn*, 513 F. 2d 925 (C.A. 10); *United States* v. *Seasholtz*, 376 F. Supp. 1288 (N.D. Okla.); *United States* v. *Dooley*, 364 F. Supp. 75 (E.D. Pa.); *United States* v. *Rosen*, 343 F. Supp. 804 (S.D. N.Y.); *Wheeler* v. *Goodman*, 306 F. Supp. 58 (W.D. N.C.), vacated on other grounds, 401 U.S. 987.

2. Petitioners contend (Pet. 10) that the court of appeals and other federal courts have failed to identify the "abnormal" cases in which expungement is justified. However, since petitioners show no impropriety at all in their indictment and prosecution but rely only on the fact of their acquittal, expungement is clearly not justified in their case. Moreover, the court below and other federal courts have deliniated the situations in which expungement may be ordered. Thus, courts have ordered expungement of records maintained in connection with

[1]Petitioners were never arrested. After their indictment they were served with criminal summonses. Thus, arrest records, as such, do not exist (Pet. App. A-2).

unconstitutional arrests,[2] illegal police harassment of citizens,[3] arrests made under an unconstitutional statute[4] and, in some circumstances, arrests made by error when no criminal charges are brought.[5] Petitioners do not contend that they were the victims of any such conduct, nor could facts be adduced which would support such allegations. There is thus nothing in this case which would justify interference "with the legitimate interests of Government law enforcement agencies in maintaining records of their own activities" (Pet. App. A-2).

The fact that petitioners are police officers does not justify according them different treatment from that accorded other persons who have been acquitted of criminal charges. Petitioners contend (Pet. 9) that their ability to testify against criminal defendants will be

[2]*Sullivan* v. *Murphy*, 478 F.2d 938 (C.A. D.C.) (mass arrests without probable cause); *United States* v. *McLeod*, 385 F. 2d 734 (C.A. 5) (arrests for purpose of interfering with the right of black persons to vote); *Bilick* v. *Dudley*, 356 F. Supp. 945 (S.D. N.Y.) (mass arrests without probable cause); *Kowall* v. *United States*, 53 F.R.D. 211 (W.D. Mich.) (arrest illegal under *Gutknecht* v. *United States*, 396 U.S. 295); *Hughes* v. *Rizzo*, 282 F. Supp. 881 (E.D. Pa.) (unconstitutional mass arrest).

[3]*Wheeler* v. *Goodman*, *supra* (systematic harassment by police).

[4]*Severson* v. *Duff*, 322 F. Supp. 4 (M.D. Fla.) (unconstitutional state disorderly conduct statute).

[5]*Menard* v. *Saxbe*, 498 F.2d 1017 (C.A. D.C.).

impaired if their records are not expunged, but both Missouri[6] and federal[7] law prohibit the use of evidence of arrest or indictment to impeach the credibility of a witness, and petitioners were not convicted of the offenses charged.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1975.

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[6]Mo. Rev. Stat. §491.050 (1975 Cum. Supp.); *State v. Rumfelt*, 258 S.W. 2d 619 (Mo. Sup. Ct.).

[7]Federal Rules of Evidence, Rule 609.